No. 16009

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

FRED DWIGHT JONES,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF OF APPELLEE.

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I.

Jurisdiction and Statement of the Case.

The Government accepts the jurisdictional statement and the statement of the case made by appellant.

II.

The Arguments Advanced by Appellant Have Been Considered and Rejected by This Honorable Court and No Valid Reason for Departing From the Established Rules Has Been Advanced.

A. The Sentence Is Not Ambiguous.

Appellant was convicted on four counts charging the illegal transportation of aliens within the United States in violation of Title 8, United States Code, Section 1324(a)(2), and sentenced to a term of five years on

each of Counts One and Two, these sentences to run concurrently, and to a term of one year on each of Counts Three and Four, said one year sentences to run concurrently with each other but consecutive to the sentence imposed on Counts One and Two. [Clk. Tr. pp. 6-7.] His initial argument is that the sentence is ambiguous and cannot reasonably be interpreted. That such an argument is patently frivolous has very recently been pointed out by this Honorable Court (*Staley v. United States,* ..... F. 2d ..... (9th Cir., 1958), decided June 25).

B. Consecutive Sentences Must Be Aggregated.

Appellant elaborates on the foregoing argument by asserting that the sentences prejudiced him in the computation of allowance for good time. It is, however, well settled that consecutive sentences are totalled for the purpose of computing the allowance for good time.

Hurst v. Zarter, et al., 195 F. 2d 526 (10th Cir., 1952);

United States ex rel. Johnson v. O'Donovan, 178 F. 2d 810 (7th Cir., 1949);

Grant v. Hunter, 166 F. 2d 673 (10th Cir., 1948).

A similar argument has been advanced with respect to appellant's eligibility for parole. The answer is the same, to-wit: consecutive sentences are totalled in determining a prisoner's eligibility for parole. (See: *United States v. Howell,* 103 Fed. Supp. 714 (U. S. D. C., S. D., W. Va., 1952), affirmed 199 F. 2d 366 (4th Cir., 1952).)

C. Section 1324 of Title 8 Is Constitutional.

Succinctly stated, the position advocated in appellant's brief is that since the sentences imposed on Counts Three and Four are directed to run consecutively to those on Counts One and Two, he will spend a greater period of time incarcerated than if the sentences were all made to run concurrently. This argument alone is obviously of no merit. However, there is an attempt to reinforce this position by challenging the validity of the penalty provision contained in Section 1324 of Title 8, United States Code, on the ground that it is unconstitutional to prescribe a separate punishment for each and every alien concerned in a violation of Section 1324, Title 8, United States Code. The Government's answer to this point is that it has been considered and rejected by this very Court in *Sepulveda v. Squier,* 192 F. 2d 796 (9th Cir., 1951). See also: *Serentino, et al. v. United States,* 36 F. 2d 871 (1st Cir., 1930). It should be noted that the *Sepulveda* case, *supra,* was decided under the predecessor of the statute under which appellant was prosecuted, the earlier enactment being Section 144 of Title 8, United States Code, 39 Stat. 808. This section was declared unconstitutional by the Supreme Court in *United States v. Evans,* 333 U. S. 483 (1948). The decision in the *Evans* case, however, was limited to the point of deciding that Congress simply failed to provide a penalty for harboring and concealing aliens who were illegally in the United States. The statute at that time provided penal sanctions only for landing or bringing in aliens.

Furthermore, the decision in the *Evans* case, after discussing the penalty clause, noted: "The clause's function was solely to augment the penalty when more than one alien was involved." 333 U. S. 483, 494. The *Sepulveda* case was decided subsequent to the *Evans* case and involved four counts of bringing aliens into the United States. After those two decisions, Section 144 of Title 8, United States Code, was amended. It is now Title 8, Section 1324, 66 Stat. 228. The successor provision has been found constitutional.

Herrera v. United States, 208 F. 2d 215 (9th Cir., 1953);

Martinez-Quiraz v. United States, 210 F. 2d 763, (9th Cir., 1954).

It is this statute under which appellant in the instant case was prosecuted.

D. Congress Provided a Separate Penalty for Each Alien Transported.

Appellant's argument that there was a single transaction for which only one penalty could be imposed is contrary to the law. He cites Mann Act cases in support of this theory. The identical argument was rejected by this Court in a case involving Section 1324 of Title 8, United States Code.

Vega-Murrillo v. United States, 247 F. 2d 735, 737-738 (9th Cir., 1957).

In summary the Government respectfully submits that *Sepulveda v. Squier* and *Vega-Murrillo v. United States* are dispositive of the argument advanced by appellant

and the authority of those cases is in no way impinged upon by the *Evans* decision, *supra,* which turned solely on a legislative oversight in Section 144 of the *old* Title 8, United States Code, but which implictly approved of the penalty provision being made proportionate to the number of aliens involved.

Conclusion.

For the foregoing reasons it is respectfully submitted that the decision of the District Court be affirmed.

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